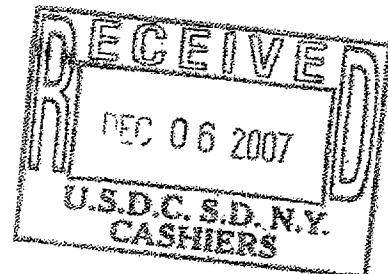


McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP  
1300 Mt. Kemble Avenue  
P.O. Box 2075  
Morristown, NJ 07962-2075  
(973) 993-8100  
Attorneys for Defendant, Berkshire Life Insurance Company of America



By  
Steven P. Del Mano, Esq.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK JUDGE SCHEINDLIN

STUART BITTERMAN, M.D.,

Plaintiff,

vs.

BERKSHIRE LIFE INSURANCE COMPANY  
OF AMERICA

Defendant.

: 07 CV 11061

: Civil Action No.

:

:

:

:

:

CIVIL ACTION – NOTICE OF REMOVAL

PLEASE TAKE NOTICE that the undersigned attorneys for defendant, Berkshire Life Insurance Company of America ("Berkshire Life"), petition this Honorable Court for an order pursuant to 28 U.S.C. § 1441, et seq., removing to the United States District Court, Southern District of New York, a matter instituted in the Supreme Court of the State of New York, County of New York, bearing index number 07113844.

PLEASE TAKE FURTHER NOTICE that a copy of this removal petition has been filed with the Clerk of the Supreme Court of the State of New York, County of New York, thereby effecting removal pursuant to 28 U.S.C. § 1446(b).

**PLEASE TAKE FURTHER NOTICE** that by effecting removal of this civil action, Berkshire Life reserve all rights to raise any and all defenses available under the Federal Rules of Civil Procedure including, but not limited to, FED. R. CIV. P. 12.

**PLEASE TAKE FURTHER NOTICE** that in support of this notice of removal, Berkshire Life shall rely upon the following:

1. On or around October 19, 2007, Stuart Bitterman, M.D. ("Dr. Bitterman") filed a complaint in the Supreme Court of the State of New York, County of New York, bearing index no. 07117844. Annexed hereto as Exhibit "A" are copies of the complaint, amended summons and correspondence issued by the State of New York, Insurance Department, dated November 13, 2007, which constitutes all process, pleadings and/or orders served upon and first received by Berkshire Life to date within the meaning and intent of 28 U.S.C. §1446(b).

2. Berkshire Life was first served with amended summons and complaint on November 16, 2007, when it first received correspondence dated November 13, 2007, from the State of New York, Insurance Department, enclosing the amended summons and complaint. On November 16, 2007, Berkshire Life first had notice of the institution of suit and the basis for the removal of this civil action upon service of the amended summons and verified complaint annexed hereto as Exhibit "A." Removal is therefore timely under 28 U.S.C. §1446(b) in that the filing of the within petition occurred within thirty (30) days of the service of the amended summons and complaint upon Berkshire Life.

3. The Court's review of the complaint will reveal that at the time of the filing of the complaint and this removal petition, Dr. Bitterman maintained a primary residence located at 217 Steven Place, Woodmere, New York 11598 and is a citizen of the State of New York within the meaning and intent of 28 U.S.C. §1332.

4. Berkshire Life is a corporation of, and maintains its principal place of business in, the Commonwealth of Massachusetts and is a citizen of the Commonwealth of Massachusetts within the meaning and intent of 28 U.S.C. §1332.

5. The complaint alleges that Dr. Bitterman was insured under a policy of disability income insurance bearing policy H 0337962 issued by Berkshire Life and that Dr. Bitterman filed a claim seeking benefits due to a total disability alleged to have commenced on November 1, 2005. Dr. Bitterman claims entitlement to receive disability benefits in the amount of \$3,137.00 monthly beginning February 1, 2006 to the date of the filing of the complaint, for a total disability payment of \$63,954.32 (First Cause of Action).

6. Dr. Bitterman further alleges entitlement to receive a supplemental cost of living indemnity disability benefit measured at four (4%) percent from November 1, 2006 (Second Cause of Action) and further seeks a declaration that he is entitled to the monthly and supplemental disability benefit to age 65 (Third Cause of Action). Finally, Dr. Bitterman asserts what appears to be a claim for liable, slander, interference with business relationships, bad faith and/or under the New York General Business Law §349 for which he claims consequential, compensatory and punitive damages in the amount of \$5 million dollars (Fourth Cause of Action).

7. At the time of the filing of the complaint and the within removal petition, the amount in controversy between the parties exceeds the sum of \$75,000.00, exclusive of interest and costs of suit.

8. There is complete diversity of citizenship between Dr. Bitterman and Berkshire Life at the time of the filing of the complaint and this removal petition. The jurisdictional monetary prerequisite of 28 U.S.C. §1332 has been met. As such, this court maintains

jurisdiction pursuant to and in accordance with 28 U.S.C. 1332. Removal is therefore appropriate pursuant to 28 U.S.C. §1441(a) and (b).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP  
Attorneys for Defendant, Berkshire Life Insurance Company  
of America

By:

Stephen P. Del Mauro, Esq.

Dated: December 6, 2007

# **EXHIBIT “A”**

STATE OF NEW YORK  
 INSURANCE DEPARTMENT  
 One Commerce Plaza  
 Albany, NY 12257

STATE OF NEW YORK  
 Supreme Court, County of New York

Stuart Bitterman, M.D.

07113844

against  
 Berkshire Life Insurance Company of America

Plaintiff(s)

Defendant(s)

RE : Berkshire Life Insurance Company of America

Attorney for Plaintiff(s) and Defendant please take notice as follows:

Sirs :

Attorney for Plaintiff(s) is hereby advised of acknowledgement of service upon me of Amended Summons and Complaint in the above entitled action on November 8, 2007 at New York, New York. The \$40 fee is also acknowledged.

Original to Attorney for Plaintiff(s) :

Schindel, Farman, Lipsius, Gardner & Rabinovich, LLP  
 Attorneys at Law  
 14 Penn Plaza, Suite 500  
 New York, New York 10122

Pursuant to the requirement of section 1212 of the Insurance Law, Defendant is hereby notified of service as effected above. A copy of the paper is enclosed.

Duplicate to Defendant :

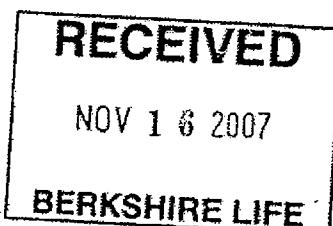
David L. Kalib, Esq.  
 Berkshire Life Insurance Company of America  
 700 South Street  
 Pittsfield, Massachusetts 01201

*Clark J. Williams*

by Clark J. Williams  
 Assistant Deputy Superintendent & Chief

Dated Albany, New York, November 13, 2007

423213 C.A.#188207



AMERICAN CLERICAL SERVICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

STUART BITTERMAN, M.D.

vs.

11-8-2007  
BERKSHIRE LIFE INSURANCE COMPANY  
OF AMERICA,  
*DL*

Plaintiff,

Defendants.

Index No.: 07113844

Date Filed:

Plaintiff designates New York  
County as the place of trialThe Basis of Venue is  
Defendant's Place of Business

## AMENDED SUMMONS

Plaintiff resides at  
217 Steven Place  
Woodmere, NY 11598  
County of Nassau

## TO THE ABOVE NAMED DEFENDANT:

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the date of service (or within thirty (30) days after service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: October 18, 2007  
New York, New York

SCHINDEL, FARMAN, LIPSIUS,  
GARDNER & RABINOVICH, LLP  
Attorneys for Plaintiff

By: Cheryl D. Lipsius  
Cheryl D. Lipsius, Esq.  
14 Penn Plaza, Suite 500  
New York, New York 10122  
(212) 563-1710

Defendant's address: Berkshire Life Insurance Company  
7 Hanover Square  
New York, NY 10004-2616  
and  
60 Broad Street  
New York, NY 10004-2306

NEW YORK  
COUNTY CLERK'S OFFICE

OCT 19 2007

NOT COMPARED  
WITH COPY FILE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

STUART BITTERMAN, M.D.,

X  
Index No.: 07113844

Plaintiff

-against-

COMPLAINT

BERKSHIRE LIFE INSURANCE COMPANY  
OF AMERICA,

Defendant.

X

Stuart Bitterman, M.D ("Dr. Bitterman"), by his attorneys, Schindel, Farman, Lipsius, Gardner & Rabinovich LLC, alleges as follows:

The Parties

1. Plaintiff, Dr. Bitterman, is a resident of Nassau County, New York.
2. Defendant, Berkshire Life Insurance Company of America ("Berkshire"), at all times relevant was and is a foreign corporation duly organized and existing under the laws of Massachusetts with its corporate headquarters in Massachusetts and its New York's office located at 60 Broad Street, New York, New York 10004-2306, and its home office at 7 Hanover Square, New York, New York 10004-2616.
3. Berkshire was and is licensed by the Insurance Department of New York.

AS AND FOR A FIRST CAUSE OF ACTION

4. On or about December 18, 1996, Berkshire approved and offered disability policy no. H 0337962 ("Occupational Policy") with issuing date of August 28, 1996 entitling Dr. Bitterman to disability benefits if he was unable to "perform the material and substantial duties of your occupation."

5. Prior to August 29, 1996 and continuing through November 1, 2005, Dr. Bitterman was a dermatologist and dermatological surgeon.
6. During that period, Dr. Bitterman regularly engaged in the occupation of dermatology and dermatological surgery.
7. Prior to November 1, 2005, Dr. Bitterman, due to illness, reduced his hours engaged in the practice of dermatology and dermatological surgery.
8. Beginning November 1, 2005, due to illness, Dr. Bitterman severely reduced his hours engaged in the practice of dermatology and dermatological surgery.
9. Beginning in the Spring of 2006 and continuing to the present, Dr. Bitterman is performing minimal duties.
10. Dr. Bitterman is disabled and is still unable to regularly practice as a dermatologist and dermatological surgeon.
11. On or about December 15, 2005 Dr. Bitterman filed a claim with Berkshire for disability benefits for total disability as defined by the Occupational Policy, commencing on November 1, 2005.
12. Berkshire has failed to promptly resolve Dr. Bitterman's disability claim.
13. Berkshire has made no disability payments to Dr. Bitterman.
14. Dr. Bitterman was entitled to disability benefits of \$3,137 per month beginning February 1, 2006 to the present, for a total disability payment of \$63,954.32.
15. As of the date of the filing of this complaint Berkshire owes Dr. Bitterman \$63,954.32 for past total disability benefits.

**AS AND FOR A SECOND CAUSE OF ACTION**

16. Plaintiff repeats and realleges paragraphs 1 through 15 with the same force and effect as if fully set forth herein.

17. Dr. Bitterman was entitled to a supplementary disability Cost of Living Indemnity Benefit at a fixed rate of 4% from November 1, 2006.

18. As of the date of this complaint Berkshire owes Dr. Bitterman for past supplementary disability Cost of Living Indemnity disability benefit.

**AS AND FOR A THIRD CAUSE OF ACTION**

19. Plaintiff repeats and realleges paragraphs 1 through 18 with the same force and effect as if fully set forth herein.

20. The Berkshire Policy provides for all monthly disability benefits including supplementary benefits until age 65, so long as Plaintiff, Dr. Bitterman remains disabled

21. Dr. Bitterman is entitled to all monthly disability benefits until age 65, so long as he remains disabled.

**AS AND FOR A FOURTH CAUSE OF ACTION**

22. Plaintiff repeats paragraphs 1 through 21 with the same force and effect as if more fully set forth herein.

23. Shortly after November 1, 2005, defendant had full knowledge that plaintiff was unable to practice as a dermatologist surgeon as a result of his disability.

24. Defendant has delayed resolution of its claim for over a year and a half.

25. Defendant has failed to provide plaintiff with disability benefits with full knowledge that plaintiff's claims are meritorious.

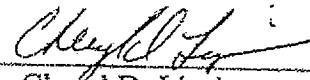
26. Defendant has failed to provide plaintiff disability benefits without investigating them adequately.
27. Defendant's actions have been intentionally designed to harass plaintiff and/or to deny him benefits to which defendant knew he was entitled.
28. Defendant's wrongful failure to provide benefits to plaintiff has been willful, wanton, and/or grossly negligent.
29. Defendant has engaged in a broad practice of denying claims without investigating said claims adequately, and/or with full knowledge that said claims were meritorious.
30. Defendant encouraged and/or instructed its employees and/or agents to engage in a broad practice of denying or failing to provide disability benefits without investigating said claims adequately and/or with full knowledge that said claims were meritorious.
31. Berkshire has breached its duty of good faith.
32. Berkshire has libeled and slandered Dr. Bitterman and has interfered with Dr. Bitterman's business relationships causing monetary damage to Dr. Bitterman and damage to his reputation.
33. Defendant made a practice of not investigating claims on a prompt basis, in good faith and in accordance with acceptable insurance and medical and medical standards.
34. Plaintiff has suffered consequential damages.
35. Plaintiff is entitled to consequential and punitive damages.
36. Defendant has willfully and/or knowingly engaged in deceptive and/or unfair settlement practices, in violation of New York General Business Law §349.

WHEREFORE, Stuart Bitterman respectfully requests that the Court enter judgment against defendant declaring that:

- a. Dr. Bitterman is owed \$63,954.32 for past disability benefits
- b. Dr. Bitterman is owed past supplementary cost of living indemnity benefits.
- c. Dr. Bitterman is entitled to all future disability and supplementary benefits until age 65 so long as he remains disabled;
- d. Dr. Bitterman's Berkshire Occupational Disability Policy is valid and provides coverage to Dr. Bitterman;
- e. Awarding plaintiff consequential compensatory and punitive damages pursuant to New York General Business Law §349 and the common law in the amount of \$5,000,000;
- f. Berkshire has libeled and slandered Dr. Bitterman and has interfered with Dr. Bitterman's business relationships causing monetary damage and damage to Dr. Bitterman's reputation.
- g. Interest and costs; and
- h. Such other relief as this Court may deem just and proper.

Dated: October 12, 2007  
New York, New York

SCHINDEL, FARMAN, LIPSIUS,  
GARDNER & RABINOVICH LLP  
Attorneys for Plaintiff Stuart Bitterman, N.Y.

By:   
Cheryl D. Lipsius  
14 Penn Plaza, Suite 500  
New York, New York 10122  
Telephone No.: (212) 563-1710  
File No. 4060.2001

STATE OF NEW YORK, COUNTY OF \_\_\_\_\_

ss.: \_\_\_\_\_

I, the undersigned, an attorney admitted to practice in the courts of New York State,

Certification  
By Attorney  
 Attorney's  
Affirmation

certify that the within  
has been compared by me with the original and found to be a true and complete copy.

in the within

and know the contents thereof:  
state that I am  
the attorney(s) of record for  
action; I have read the foregoing  
the same is true to my own knowledge, except as to the matters therein alleged to be on information and belief, and as to those matters  
I believe it to be true. The reason this verification is made by me and not by

The grounds of my belief as to all matter not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF \_\_\_\_\_

ss: \_\_\_\_\_

The name signed must be printed beneath

I,

Individual  
Verification in the within action; I have read the foregoing  
and know the contents thereof; the same is true to my own knowledge, except  
as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.  
 Corporate  
Verification the \_\_\_\_\_ of \_\_\_\_\_  
a corporation and a party in the within action; I have read the foregoing  
and know the contents thereof; and the same is true to my own knowledge,  
except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. This  
verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on \_\_\_\_\_

20 \_\_\_\_\_

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF \_\_\_\_\_

ss.: \_\_\_\_\_ (If more than one box is checked – indicate after names type of service used.)

I, \_\_\_\_\_

of age and reside at \_\_\_\_\_

On \_\_\_\_\_

20 \_\_\_\_\_

I served the within

Service  
By Mail by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

Personal  
Service on  
Individual by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as *a party therein*:

Service By  
Electronic  
Means by transmitting the papers by electronic means to the telephone number listed below, with number was designated by the attorney for such purpose. I received a signal from the equipment of the attorney served indicating that the transmission was received. I also deposited a true copy of the papers, enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service, addressed to the attorney at the address set forth after the name:

Oversight  
Delivery  
Service by depositing a true copy thereof, enclosed in a wrapper addressed as shown below, into the custody of \_\_\_\_\_ for overnight delivery, prior to the latest time designated by that service for overnight delivery.

► Index No. **SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

**STUART BITTERMAN, M.D.,**

Plaintiff,

-against-

**BERKSHIRE LIFE INSURANCE COMPANY OF AMERICA**

Defendants.

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## COMPLAINT

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**SCHINDEL, FARMAN, LIPSIUS, GARDNER & RABINOVICH LLP**  
*Attorneys for Plaintiff*

*Office and Post Office Address, Telephone*  
14 PENN PLAZA, SUITE 500  
NEW YORK, NEW YORK 10122  
(212) 563-1710

To

*Attorney(s) for*

Service of a copy of the within is hereby admitted.

Dated,

*Attorney(s) for*

Sir: —Please take notice

NOTICE OF ENTRY

that the within is a (*certified*) true copy of a  
duly entered in the office of the clerk of the within named court on

20

NOTICE OF SETTLEMENT

that an order  
settlement to the HON.  
of the within named court, at

of which the within is a true copy will be presented for  
one of the judges

on 20 at M.

Dated,

Yours, etc.

**SCHINDEL, FARMAN, LIPSIUS,  
GARDNER & RABINOVICH LLP**

*Attorneys for*

To